Supreme Court, U. S.
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No. 80-662

In the Supreme Court of the United States

October Term, 1980

ROBERT C. SULLIVAN, Agent for Pipe Fitter Claimants,
Plaintiff-Appellant,

vs.

KAISER ENGINEERS, INC., and OBERLE-JORDRE ENGINEERING AND ERECTORS, and POWER PIPING, INC., and BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES, and ALBERT G. GILES, Administrator, Ohio Bureau of Employment Services,
Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

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ROBERT C. SULLIVAN, Agent for Pipe Fitter Claimants,
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KAISER ENGINEERS, INC., and OBERLE-JORDRE ENGINEERING AND ERECTORS, and POWER PIPING, INC., and BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES, and ALBERT G. GILES, Administrator, Ohio Bureau of Employment Services,
Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

The Appellees, Kaiser Engineers, Inc., Oberle-Jordre Engineering and Erectors, and Power Piping, Inc., move the Court to dismiss the appeal herein or, in the alternative, to affirm the decision of the Supreme Court of Ohio which granted the motion of the Appellees to dismiss the appeal filed with that court by the Appellant, on the ground that the appeal herein presents no substantial federal question and that no further argument is required.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute.

This appeal involves the construction and application by the Supreme Court of Ohio of certain provisions of Ohio unemployment compensation legislation, to-wit, Title 41, Ohio Revised Code §§ 4141.01(I) and 4141.28(O). Section 4141.01(I) states:

> "'Interested party' means the administrator and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code."

Section 4141.28(O), in relevant part, states:

> "Any interested party may, within thirty days after notice of the decision of the board was mailed to the last known post office address of all interested parties, appeal from the decision of the board to the court of common pleas of the county wherein the appellant, if an employee, is resident or was last employed or of the county wherein the appellant, if an employer, is resident or has his principal place of business in this state. Such appeal shall be taken within such thirty days by the appellant by filing a notice of appeal with the clerk of the court of common pleas, with the board, and upon all appellees by registered mail to their last known post office address. Such notice of appeal shall set forth the decision appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the clerk. All other

interested parties before the board or the referee shall be made appellees. * * * After an appeal has been filed in the court, the board may, by petition, be made a party to such appeal. If the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse and vacate such decision or it may modify such decision and enter final judgment in accordance with such modification; otherwise such court shall affirm such decision. Any interested party shall have the right to appeal from the decision of the court as in civil cases, provided a bill of exceptions shall not be required at any level of appeal."

In *Re Claim of King* (April 16, 1980) 62 O.S. 2d 87, 403 N.E. 2d 200, the Supreme Court of Ohio, construing the above-quoted sections of the Act, held that the Administrator of the Ohio Bureau of Employment Services is an "interested party" in all appeals to the Court of Common Pleas from a decision of the Board of Review of the Bureau of Employment Services and that whenever an appeal is undertaken without the Administrator being made a party thereto, the Court of Common Pleas lacks "subject matter jurisdiction."

B. The Proceedings Below.

By initial decisions issued in some 610 claims for unemployment compensation benefits, involving several different employers on various dates from July 9, 1974 through October 8, 1974, inclusive, the Administrator of the Ohio Bureau of Employment Services held that the employees in those cases became unemployed due to a "lack of work" and allowed unemployment compensation claims for all employees represented by certain building trades unions, including the Pipe Fitters, Laborers, Car-

penters, Inside Electricians, Structural and Reinforcing Iron Workers, Cement Masons, Operating Engineers, Painters and Plumbers.

The employers appealed the allowance of all of these claims, and a hearing consolidating all claims and appeals was held by a Referee of the Board of Review, Ohio Bureau of Employment Services, in Cincinnati, Ohio on January 27, 1976.

As a result of the hearing, the Referee decided that the claimants represented by the Pipe Fitters and the Laborers were disqualified from receiving benefits because their unemployment was due to a labor dispute other than a lockout. Accordingly, the Referee reversed the allowance of the claims of the employees represented by the Pipe Fitters and Laborers, but affirmed the allowance of all other claims. (See Appendix H to Jurisdictional Statement filed herein by Appellant.)

The Referee's decision was appealed by the Pipe Fitters and the Laborers to the Board of Review. On October 15, 1976, the Board affirmed the decision of the Referee, holding that the Pipe Fitters and Laborers were disqualified from receiving benefits.

On November 5, 1976, the Appellant filed with the Court of Common Pleas of Hamilton County, Ohio, in Case No. A7609115, a purported "NOTICE OF APPEAL FROM DECISIONS OF BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES", a copy of which is annexed hereto as Appendix 1. In this Notice of Appeal, the named Appellees were Kaiser Engineers, Inc., Oberle-Jordre Engineering and Erectors, and Power Piping, Inc. Neither the Board of Review, Ohio Bureau of Employment Services, nor the Administrator of the Ohio Bureau of Employment Services was named as an Appellee.

Subsequent to the filing of the above "NOTICE OF APPEAL", and after the thirty-day period prescribed in R.C. 4141.28(O) for the filing of a Notice of Appeal had expired, the Appellant, on or about January 24, 1977 filed in the Common Pleas Court a "MOTION-PETITION OF PLAINTIFF TO ADD NEW PARTY DEFENDANT", in which leave was sought to make "the Board of Review, Ohio Bureau of Employment Services, 145 South Front Street, P.O. Box 1618, Columbus, Ohio 43216, an additional party defendant in this appeal action." (Appendix 2) On February 3, 1977, this motion was granted. (Appendix 3)

The Court of Common Pleas affirmed the decision of the Referee and the Board and entered final judgment, denying benefits on November 16, 1977.

An appeal was taken to the Court of Appeals for the First Appellate District by the Pipe Fitter claimants in Case No. C77756. The Court of Appeals affirmed the decision of the Court of Common Pleas on June 30, 1979. (See Appendix C to Appellant's Jurisdictional Statement) An appeal was then taken by the Appellant to the Supreme Court of Ohio on July 30, 1979. A motion to certify the record was granted and on March 19, 1980, the Supreme Court of Ohio heard oral arguments on the merits.

On April 16, 1980, and while the above case was awaiting decision, the Supreme Court of Ohio decided the case of *Re Claim of King, supra,* which held that in such a case, the Common Pleas Court lacked subject matter jurisdiction whenever, as in the instant case, the Administrator of the Ohio Bureau of Employment Services was not made a party to the appeal and proceeding.

Following publication of the Court's decision in *Re Claim of King*, the Appellees filed a motion in the Supreme Court of Ohio, directing its attention to the lack of subject matter jurisdiction in the instant case and seeking dismissal of the appeal. After further briefing by the parties, in which the Administrator of the Bureau of Employment Services supported the motion to dismiss filed by the Appellees, the Supreme Court, on June 11, 1980, granted the Appellees' motion to dismiss the appeal. On June 18, 1980, the Appellant moved for a rehearing, claiming that the Administrator had, in fact, been served with notice of the pendency of the appeal in the Common Pleas Court. There was no contention, however, that the Administrator had ever been named as a party-appellee in the Notice of Appeal or had been added as a party-appellee within the thirty-day period prescribed by 4141.28(O), or at any time thereafter. On July 24, 1980, the Supreme Court of Ohio denied the motion for rehearing.

II

ARGUMENT

The Case Presents No Substantial Federal Question.

The law to be applied in determining whether the Appellant duly perfected his appeal from the Board of Review to the Common Pleas Court of Hamilton County, Ohio, is the law of Ohio. Construction of the law of Ohio is the exclusive prerogative of the Supreme Court of Ohio. In *Erie v. Tompkins* (1938) 304 U.S. 64, this Court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." (At 78)

The Court further said, quoting from its earlier decision in *B&O Railroad Co. v. Baugh* (1893) 149 U.S. 368, at 401, that:

> " 'Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.' " (At 79)

The Appellant's right to appeal to the Common Pleas Court was a statutory right conferred by Revised Code 4141.28(O) and 4141.01(I). The Legislature which conferred the right of appeal had the right to establish the

conditions for the exercise of that right. One of the conditions was that the right must be exercised "within thirty days after notice of the decision of the board was mailed." Another condition was that all "interested parties before the board or the referee shall be made appellees." In 4141.01(I), the Legislature stated:

> " 'Interested party' means the *administrator* and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code." (Emphasis added)

In the instant case, the Appellant failed to comply with the explicit requirement of the statute that the Administrator "shall be made" an appellee. The only appellees named by him within the thirty-day period were the three employers who have filed the instant motion. The Supreme Court of Ohio, exercising its constitutional jurisdiction, has declared that whenever an appellant violates the requirement that the Administrator be made a party, the Common Pleas Court lacks "subject matter jurisdiction" and that in such case, the purported appeal must be dismissed. *Re Claim of King, supra,* at 201; Opinion in instant case, Jurisdictional Statement, Appendix B-1 (pages 2a-4a).

The defect of subject matter jurisdiction is one which can be raised at any stage of a legal proceeding. *Federal Rules of Civil Procedure,* Rule 12(h)(3); *Ohio Rules of Court,* Rule 12(H)(2); *Louisville & Nashville Railroad v. Mottley* (1908) 211 U.S. 149.

The incurable jurisdictional defect in the instant case is *not* that the Administrator lacked *notice* of the existence of the appeal. The defect is that he was never made a *party* to the Common Pleas case. As indicated

above, to become a party, he would have had to be named as a party in a notice of appeal filed within the thirty-day period specified in the statute. He was never so named. The practical importance of compliance is illustrated by the fact that, absent compliance, the Administrator would not have had the right to appeal from an adverse decision of the Common Pleas Court if an adverse decision had been rendered by that court. Section 4141.28(O) asserts, "Any interested *party* shall have the right to appeal from the decision of the court as in civil cases * * *" There is no provision for appeals by a non-party, such as the Administrator here. Surely the Ohio Supreme Court had a Constitutional right to conclude that the Common Pleas Court would have no jurisdiction to decide an appeal when a necessary party was not timely listed in the Notice of Appeal and thus had not properly been brought before the Court.[1]

Bouie v. Columbia (1964) 378 U.S. 347, relied on by the Appellant, is inapplicable for several reasons:

(a) In *Bouie*, the state statute was phrased in narrow terms and specifically prohibited only "*entry* upon the lands of another * * * after notice from the owner or tenant prohibiting such entry * * *". (At 349; emphasis added) The appellant had been permitted by the owner to enter the premises and only at some later time was asked by the owner to leave. When he refused to do so, he was convicted for violation of the criminal statute. The conviction was then approved by the state Supreme Court which expanded the statute by construction to include refusals to leave as well as entry after notice prohibiting entry. In reversing, this Court noted that "a statute precise on

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1. As indicated above, even the Bureau was not named as a party until after expiration of the thirty-day period.

its face has been unforeseeably and retroactively expanded by judicial construction" (at 352) and stated:

> "When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." (At 352)

The Court also noted that in earlier decisions, such as that in *State v. Green* (1892) 35 S.C. 266, the state court had limited the statute to "entry" situations. (At 356) In the instant case, a statute narrowly worded, which by its terms requires "the administrator" to be made an "appellee" (R.C. 4141.01(I) and 4141.28(O)) has been given a narrow—not a broad—construction by the state Supreme Court, precisely reflecting the narrowly expressed intention of the state legislature. (*Re Claim of King, supra,* at 201-202) Also, it should be noted that the earlier decision of the Supreme Court of Ohio relied on by the Appellant (*Joy Mfg. Co. v. Albaugh* (1953) 159 O.S. 460) involved statutory provisions different from those construed in *Re Claim of King, supra.* The provisions in *Joy* were G.C. 1345-1g and 1346-4. The provisions construed in *Re Claim of King, supra,* were R.C. 4141.01(I) and 4141.28(O). In deciding *Re Claim of King, supra,* the Supreme Court stated:

> "Appellee's reliance on our decision in *Joy Mfg. Co. v. Albaugh* (1953), 159 Ohio St. 460, 112 N.E.2d 540, is misplaced. In that case we interpreted the predecessor statute to the current R.C. 4141.28(O). The earlier statute did not so clearly mandate that the administrator of the Bureau of Employment Services be served with notice, as does the present statute." (At 201-202)

(b) The statute in *Bouie* was a criminal statute; that in the instant case involved a civil appeal. The fact that the statute in *Bouie* was criminal was noted by this Court as a decisive factor, the Court stating:

> "The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court." (At 350-51)

The Court concluded:

> "The crime for which these petitioners stand convicted was 'not enumerated in the statute' at the time of their conduct. It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment." (At 363)[2]

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2. The two other cases cited by the Appellant are clearly inapplicable. In *Saunders v. Shaw* (1917) 244 U.S. 317, a party to litigation was denied an opportunity to present evidence relevant to the issue in the case. In his motion for rehearing in the instant case, the Appellant applied for leave to prove that he notified the Administrator of the pendency of the appeal. As indicated above, such notification would not make the Administrator a party to the proceeding, as required by the statute, and therefore, would not be relevant to the issue in the instant case.

In *Missouri v. Gehner* (1930) 281 U.S. 313, it was held that under certain circumstances, a contention properly can be raised for the first time in a petition for rehearing. In the instant case, the Appellees do not assert that the Appellant had no right to raise the notice question for the first time in his motion for rehearing. The Appellees assert that the contention thus advanced, for reasons indicated above, was irrelevant and immaterial, and, therefore, did not justify further hearing by the Court.

III

CONCLUSION

For reasons set forth above, it is evident that this appeal presents no substantial federal question. Therefore, the motion to dismiss should be granted or, in the alternative, the decision of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

J. MACK SWIGERT
600 Dixie Terminal Building
Cincinnati, Ohio 45202
Attorney for Defendants-Appellees

APPENDIX 1

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A7609115

ROBERT C. SULLIVAN, Agent for Pipe Fitter Claimants, 1228 Central Parkway, Cincinnati, Ohio 45210,
Plaintiff-Appellant,

-vs-

KAISER ENGINEERS, INC., P. O. Box 201, Moscow, Ohio 45153, and OBERLE-JORDRE ENGINEERING & ERECTORS, Tri-State Building, 432 Walnut Street, Cincinnati, Ohio 45202, and POWER PIPING, INC., 829 Beaver Avenue, Pittsburgh, Pennsylvania 15223,
Defendants-Appellees.

NOTICE OF APPEAL FROM DECISIONS OF BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES

(Filed November 5, 1976)

Pursuant to Sections 4141.28(O) and (P) of the Ohio Revised Code, plaintiff-appellant hereby appeals from the following decisions of the Board of Review, Ohio Bureau of Employment Services, mailed October 15, 1976, disallowing further appeal and affirming the decision of its Referee disallowing unemployment compensation benefits to the within claimants, copies of which are attached to this Notice of Appeal, incorporated by reference, and identified as Exhibits "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", and "L" respectively:

Exhibit	Claimant	Employer	Appeals Docket No.
"A"	Paul E. Abbott, et al.	Kaiser Engineers, Inc.	423777-M-BR, et al. 4040-76
"B"	Roger D. Adams, et al.	Power Piping, Inc.	423435-M-BR, et al. 4039-76
"C"	John J. Bose	Kaiser Engineers, Inc.	423811-BR 4045-76
"D"	Ronald F. Bryant, et al.	Oberle-Jordre Engineering & Erectors	422125-M-BR, et al. 4038-76
"E"	Larry L. Chaney	Power Piping, Inc.	423450-BR 4042-76
"F"	Larry L. Chaney	Power Piping, Inc.	423451-BR 4043-76
"G"	Edward J. Dapper	Kaiser Engineers, Inc.	423919-BR 4047-76
"H"	Sidney W. Freeman	Kaiser Engineers, Inc.	423956-BR 4048-76
"I"	Charles R. McGowan	Kaiser Engineers, Inc.	424181-BR 4053-76
"J"	William A. O'Hearn	Kaiser Engineers, Inc.	424213-BR 4054-76
"K"	Richard W. Rummel	Kaiser Engineers, Inc.	424334-BR 4055-76
"L"	Nathan D. Sowels	Power Piping, Inc.	423530-BR 4044-76

Plaintiff-appellant is Business Manager of Pipe Fitters Union Local No. 392 and files this Notice of Appeal pursuant to Section 4141.28(P) of the Ohio Revised Code, as agent for all claimants who are parties constituting the class and group of claimants adversely affected by the decisions of the Board of Review set forth in Exhibits "A" through "L" attached hereto.

Plaintiff-appellant contends that the Board's application of the "labor dispute" disqualification provision in these decisions denying benefits to claimants, is an erroneous interpretation of Section 4141.29(D)(1)(a) of the Ohio Revised Code, is violative of the public policy of Ohio, and unconstitutionally deprives claimants of equal protection and due process of law as guaranteed to them under the Constitutions of the State of Ohio and the United States of America.

Plaintiff-appellant further contends that the Board's Referee committed error prejudicial to claimants at the hearing held on these cases on January 27, 1976, in failing to rule upon specific objections made on behalf of claimants to certain evidence and in admitting into evidence improper and objectionable matter, thereby depriving claimants of due process of law.

Plaintiff-appellant says that the decisions of the Ohio Board of Review as set forth in Exhibits "A" through "L" attached hereto were unlawful, unreasonable, and/or against the manifest weight of the evidence, and that said decisions should be reversed, vacated and final judgment entered in favor of claimants represented by plaintiff-appellant.

/s/ Harold G. Korbee
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Trial Attorney for Plaintiff-Appellant
Six East Fourth Street
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(513) 381-2121

Of Counsel:
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Cincinnati, Ohio 45202
(513) 381-2121

PROOF OF SERVICE

I hereby certify that a copy of the within Notice of Appeal was served upon the following persons by registered mail to their last known address this 5th day of November, 1976:

1. Ohio Board of Review
   Ohio Bureau of Employment Services
   P.O. Box 1618
   145 South Front Street
   Columbus, Ohio 43216

2. Kaiser Engineers, Inc.
   P.O. Box 201
   Moscow, Ohio 45153

3. Oberle-Jordre Engineering & Erectors
   Tri-State Building
   432 Walnut Street
   Cincinnati, Ohio 45202

4. Power Piping, Inc.
   829 Beaver Avenue
   Pittsburgh, Pennsylvania 15223

5. William K. Engeman,
   Attorney at Law
   Taft, Stettinius & Hollister
   Attorneys for Kaiser Engineers, Inc.,
   Oberle-Jordre Engineering & Erectors and
   Power Piping, Inc.
   600 Dixie Terminal Building
   49 East Fourth Street
   Cincinnati, Ohio 45202

/s/ Harold G. Korbee
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Six East Fourth Street
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APPENDIX 2

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A7609115

ROBERT C. SULLIVAN, Agent for Pipe Fitter Claimants,
1228 Central Parkway, Cincinnati, Ohio 45210,
Plaintiff-Appellant,

-vs-

KAISER ENGINEERS, INC., et al., P.O. Box 201,
Moscow, Ohio 45153,
Defendants-Appellees.

MOTION-PETITION OF PLAINTIFF TO ADD NEW PARTY DEFENDANT

Pursuant to Ohio Rules of Civil Procedure and Section 4141.28(O) of the Ohio Revised Code, plaintiff-appellant moves and petitions the Court for an order making the Board of Review, Ohio Bureau of Employment Services, 145 South Front Street, P.O. Box 1618, Columbus, Ohio 43216, an additional party defendant in this appeal action.

/s/ Harold G. Korbee
Harold G. Korbee, Trial Attorney
for Plaintiff-Appellant
Six East Fourth Street
Cincinnati, Ohio 45202
(513) 381-2121

MEMORANDUM

Plaintiff-appellant filed this action on November 5, 1976, pursuant to Sections 4141.28(O) and (P) of the Ohio Revised Code, appealing from certain decisions of the Ohio Board of Review.

Under the applicable statute, Ohio Revised Code 4141.28(O), the Board of Review is not a necessary or mandatory party defendant. But "after an appeal has been filed in the court, the board may, by petition, be made a party to such appeal."

On November 5, 1976, the Board of Review was served with a copy of the notice of appeal in this action and a demand for a certified transcript of proceedings before the Board of Review.

Although Section 4141.28(O) of the Ohio Revised Code requires the Board of Review to file with the Clerk a certified transcript of the record of the proceedings before the Board within 30 days after the filing of such demand, the Board has failed to file such transcript as of January 21, 1977.

Plaintiff-appellant respectfully requests that the Court order that the Board of Review, Ohio Bureau of Employment Services be named as an additional party defendant in this appeal action.

/s/ Harold G. Korbee
Harold G. Korbee,
Trial Attorney for Plaintiff-Appellant
Six East Fourth Street
Cincinnati, Ohio 45202
(513) 381-2121

NOTICE OF HEARING

Please take notice that the foregoing Motion-Petition will be heard on February 3, 1977 at 3:00 p.m. before Hon. Robert L. Black, Judge of the Court of Common Pleas, Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion and Memorandum was served upon the Board of Review, Ohio Bureau of Employment Services, P.O. Box 1618, 145 South Front Street, Columbus, Ohio 43216 by certified mail and upon J. Mack Swigert, Esq., Attorney for Kaiser Engineers, Inc., Oberle-Jordre Engineering & Erectors, and Power Piping, Inc., by ordinary mail this 24th day of January, 1977.

/s/ Harold G. Korbee
Harold G. Korbee,
Trial Attorney for Plaintiff-Appellant
Six East Fourth Street
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APPENDIX 3

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A7609115

ROBERT C. SULLIVAN, Agent for Pipe Fitter Claimants,
Plaintiff-Appellant,

-vs-

KAISER ENGINEERS, INC., et al.,
Defendants-Appellees.

ENTRY MAKING BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES, ADDITIONAL PARTY DEFENDANT-APPELLEE

This matter came on for hearing before the Court on February 3, 1977, upon the motion of plaintiff-appellant petitioning the Court to add the Board of Review, Ohio Bureau of Employment Services, as an additional party defendant pursuant to Section 4141.28(O) of the Ohio Revised Code.

Based upon the motion, memorandum and argument, the Court finds plaintiff's motion well taken and hereby orders that the Board of Review, Ohio Bureau of Employment Services, 145 South Front Street, P.O. Box 1618, Columbus, Ohio 43216, be, and hereby is, made an additional party defendant-appellee in this action.

It is further ordered that a copy of this order be served upon the Board of Review, Ohio Bureau of Employment

Services, by plaintiff-appellant or his legal representative, by certified mail, on or before February 15, 1977.

.....

/s/ Harold G. Korbee
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.....

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